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CHARLES E. HUGHES

In the Supreme Court of the United States

OCTOBER TERM, 1930

Original No. 12

STATE OF CONNECTICUT

v.

COMMONWEALTH OF MASSACHUSETTS

IN EQUITY

REPLY BRIEF FOR THE COMPLAINANT

BENJAMIN W. ALLING,
Attorney-General of the State of Connecticut.

ERNEST L. AVERILL,
Deputy Attorney-General.
BENEDICT M. HOLDEN,
Special Counsel.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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COMPLAINANT'S REPLY BRIEF

Massachusetts, in its brief on file, claims that the issue in the case at bar:

> "calls for the application of international law principles of the same sort as those which controlled the decision of the International Commission which approved the application of the City of Winnipeg for permission to divert water from a tributary of the Lake of the Woods, an *international* water like the Connecticut River."
>
> (Brief of Massachusetts, p. 104.)

It asks the acceptance of a stated order of precedence among the various uses for waters:

> "(1) Uses for domestic and sanitary purposes;
> "(2) Uses for navigation, including the service of canals for the purposes of navigation;
> "(3) Uses for power and for irrigation purposes."
>
> (Brief of Massachusetts, p. 117.)

The claim that the use of water for domestic purposes should be first in order of priority is sound. Such use should not be exclusive but it should be given first consideration by both states, and the adoption of this rule and its application to features of this case was urged in argument to the Special Master by the complainant state. Consideration of this principle is urged by Massachusetts in order to meet an existing necessity for the further development of a water supply for Boston and vicinity. The necessity for further development of a water supply is conceded but we do not agree that the Connecticut watershed must be the objective. At to the manner in which uses of natural streams may be enjoyed in states adopting the common

law similar to that which prevails in Massachusetts and Connecticut, it is elemental that the use must be made in such manner as not to injure or damage the rights of riparian owners to a reasonable use and enjoyment of the same water.

The rule of riparian use necessarily has its roots in the doctrine of equality of rights. And wherever it is possible to do so the courts will ensure such an equitable division of the water as to permit a use which does not cause damage to or prevent a full and lawful use by lower riparians. Without regard to the common law or the theory of equitable division, Massachusetts made its plans and proceeded along the lines of carrying them into effect for the purpose of taking a quantity of water from tributaries of an interstate stream, which plans, if unchecked, would have interfered with and injured navigation. The original bill filed in this court complains of the action to be taken as outlined in the Massachusetts legislation. The War Department has found that unless the original plans of Massachusetts were modified, navigation would be injured.

Now Massachusetts indicates in brief and by statements of counsel that it will observe the first step in obedience to the doctrine of equitable division by conforming to the suggestions of the War Department. Counsel cannot bind Massachusetts, and unless this court acts upon the admissions contained in the Massachusetts brief, and by decree safeguards navigation as has been suggested by the War Department, we fail to see the remedy in the event that Massachusetts should subsequently see fit to change its mind and adhere to its original plan.

In the brief of Massachusetts Upon Complainant's Exceptions to the Report of the Special Master (page 22), it is stated:

> "The Special Master was correct in ruling that the principle of 'equality of right' controlled the use of the

> Connecticut River by the states through which it flows. Massachusetts is entitled to make a reasonable use of the waters of the Connecticut River, *including the right to appropriate permanently an equitable portion of its waters.*" (Italics ours.)

No evidence was submitted in the case tending to demonstrate what constituted an equitable portion of the waters of the Connecticut River to which Massachusetts would be entitled to permanently appropriate rather than use and return to the stream.

The evidence before the Master was confined strictly to that tending to show the injuries suffered by Connecticut from diversions as proposed by Massachusetts, modified by the restrictions of the Secretary of War. The Master stated, in the course of the hearings, that in his mind that was the question before him. He did not exclude, but he frowned upon, evidence which Connecticut offered tending to show the effect of the diversion of water from rivers in the Connecticut valley other than the Ware and Swift. In the report of the Special Master, he found this evidence to be immaterial. In the same report, there is no weight given to the evidence which Connecticut submitted of the effect of the diversions as proposed by the Massachusetts legislation without modification by the restrictions of the Secretary of War. The case therefore was strictly confined to the effect of the diversions as proposed by Massachusetts and as modified by the restrictions of the Secretary of War. It was based upon the theory that Massachusetts would take all the available water at times of low flow in excess of that needed to maintain present navigability.

Connecticut claimed that it is contended in Connecticut's brief upon the exceptions to the report of the Special Master, that damage was shown to the following interests in the State of Connecticut:

1. Navigation
2. Pollution
3. Agriculture
4. Power
5. Fish Life

The brief of Massachusetts, upon Complainant's exceptions to the report of the Special Master, and the Report of the Special Master concede that there will be some damage to agriculture but that the damage will be small; also that damage will be done to the power project on the Connecticut River at King's Island, for which a federal permit has been issued, but that compensation in money damages can be made for the rights destroyed.

With respect to the other three items, Massachusetts does not concede any damage but bases its claim upon the theory that at all times of low flow there will be an increase instead of a diversion, a position which is directly contrary to the condition which will prevail during forty percent of the period of low flow. Connecticut, in its brief, has stated its claim to damage on the other three items and the court must decide by the weight of evidence and the strength of the relative claims of the two parties.

If the evidence before the Master of the diversion proposed by Massachusetts under their legislation, without the modification of the restrictions of the Secretary of War, had been considered by him there is no question that the Master would have found himself, as did the Secretary of War in passing upon the application of Massachusetts to divert from the Swift River, "unwilling to admit that the appropriation of water . . . . . might not have an appreciable effect on the navigable capacity of the Connecticut River." It is Connecticut's claim that the case was tried on a specific degree of diversion and that this diversion resulted in a specific degree of damage

to various interests in Connecticut. There can be no question that diversion under the Massachusetts legislation, resulting in the abstraction of slightly larger quantities of water from the tributaries of the Connecticut River would have resulted in greater damage to the Complainant state.

It is conceded that the War Department's modification of the diversion was a step toward the amelioration of the damage to Connecticut, but a step which did not effect a complete elimination of that damage.

Massachusetts brief, (page 50), concedes that variations from averages in the matter of stream flow will account for a large number of days in the average year when no protection to navigation is afforded by the modifications of the Secretary of War.

The "occasional unusual day" (Massachusetts brief, page 51), is not supported by the evidence in the case. Massachusetts is referring to Exhibit C-41, which shows that 30 days out of 67 days the War Department's modifications failed to provide protection for navigation at times of low river stages. This cannot be called an "occasional unusual day."

The case is one of *degree of diversion*. No one will deny that a greater diversion will cause a greater damage. The works which Massachusetts is projecting westward from the Metropolitan District and constructing in the valley of the Swift River is sufficient for the diversion of water from nearly a thousand square miles of drainage area. Connecticut appealed to the Master to take cognizance of the size of these works, but he refused. In *United States v. Sanitary District*, 266 U. S., 405, Justice Holmes, writing the opinion of the court, said that since the Act of the State of Illinois created the Chicago Sanitary and Ship Canal of a capacity of 600,000 cubic feet per min-

ute, he would consider that that was the quantity of water which the Chicago Sanitary District was diverting or would divert and against which injunction should issue.

Connecticut has never pleaded in this case that it would be an unwilling party to an equitable use of the benefits of Connecticut River waters. On the contrary, Connecticut has attempted to show by evidence in the hearings that a conservation of water was one of the State's adopted policies. In coming into this Court, however, to insure the fulfillment of this policy, Connecticut came in the belief that it would be necessary to support its claim upon established principles of law, the common law of riparian rights.

The attention of the court is respectfully directed to Exhibit "C-25-a" and "C-25-b," which show specifically that the modifications of the War Department were a step in the right direction, but which show at the same time what a short step that was and what a much greater difference a little longer step in the same direction might have meant. These two exhibits show that the modifications of the Secretary of War affected only the stages at Hartford of 1 and 2 feet and that all stages over 2 feet remain unchanged as to quantity of water diverted.

It is contended by Connecticut that before any ruling can be made upon the equitable use of the waters of the Connecticut River, some inquiry should be made into the effect of extending the modifications of the Secretary of War to higher flows such as those occurring at stages of 3 and 4 ft.

From Exhibit "C-25-a," the diversion at 3-foot stage at Hartford is 125 cubic feet per second for 15 percent of the time. This quantity of water amounts to about 12 million gallons per day average throughout the year, an insignificant amount of water in the total yield which Massachusetts expects

to obtain by the proposed diversion and yet a sufficient amount of water if properly stored in the proposed reservoir and released at times of stringency to effect a noticeable decrease in the amount of injury to be suffered by Connecticut as a result of the diversion.

It is contended by Connecticut that no equitable use theory can be applied to the waters of the Connecticut River without consideration of these factors. The modifications of the Secretary of War are eloquent evidence that this diversion, and particularly the effect of this diversion, is primarily a question of degree. The Secretary of War found that if the diversion were carired out under the Massachusetts legislation, he would be unwilling to admit that there might not be a serious diminution of the navigable capacity of the Connecticut River. He proceeded to impose modifications which he said would change the diversion so that it would have no effect upon the navigable capacity of the navigable portion of the Connecticut River. Yet the difference between the amount of water diverted under the Massachusetts legislation and under the same legislation as modified by the restrictions of the Secretary of War is only 13/100 of 1 percent of the total flow of the Connecticut River at the Massachusetts-Connecticut State Line.

The restrictions of the Secretary of War only apply at stage of 2.1 or below at Hartford, while the entire amount of water taken when the Hartford gauge stands at 3.5 feet or below is 600 million cubic feet per year, or .1 of 1 percent of the annual average flow.

It is evident from the defendant's brief that Massachusetts acknowledges a desire to use the waters of the Connecticut River watershed for a non-riparian use and for a use which it feels it cannot justify under any known rule of law. To overcome this difficulty it suggests that it is possible to either extend

present rules of law to convert what has always been considered a non-riparian use into a riparian use or authorize a conceded non-riparian use through the judicial power of government upon the payment of compensation.

As to the first principle there should be no thought of compensation. If conditions and circumstances warrant the inclusion of their proposed use of water in the category of "reasonable use", the element of damage should be removed from consideration. In equity we would then have a situation recognized as an equitable principle, of *damun absque injuria*.

On the other hand if the idea is to seek from a court of equity relief upon the payment of damages then we cannot escape the real issue which is, can or should the judicial branch of government be asked to indirectly substitute its decree for what ordinarily is considered as the province of the legislative branch of government in the exercise of the power of eminent domain.

Whichever principle is to be considered, Massachusetts offers as its reason for the adoption of either rule an existing necessity and emergency for the further development of a water supply for Boston and vicinity. This necessity and emergency is also conceded. Not that the Connecticut watershed must be the objective but that *some source* must be developed.

A number of sources can be developed. For the purposes of this argument we will remove from consideration any plans suggested by Connecticut and confine our attention to those proposed by engineers representing the Commonwealth of Massachusetts and the Metropolitan District.

These sources are four in number. *First*, increased yield from present sources of supply. *Second*, existing sources *avail-*

able but undeveloped. Third, the Merrimack River. *Fourth*, a combined Merrimack and Ipswich River development.

As to the *first*, for a number of years, and in at least two official reports of engineers of national reputation (Ex. C-1 and C-3) it has been demonstrated that too much water is being used for purification purposes with a resulting loss and waste of water during the season of plenty. It has been stated officially to the Great and General Court that instead of the 179,000,000 gallons per day which should be the yield of present district sources, about 147,000,000 gallons per day is considered as the safe yield. This difference of 32,000,000 gallons per day is utilized to purify waters which the general public is led to believe do not need purification and could be made available for consumption by the installation of filters designed to accomplish the result now obtained by excess storage.

As to the *second*, the agreed statement as to Massachusetts' claim of available supplies (Joint Summary of Evidence, p. 160) we find 85,000,000 per day *available but undeveloped* (70 million gallons per day Ipswich and 15 million gallons per day Assabet). These supplies have been considered as available for many years. (Exhibit "C-1," "C-2" and "C-3") but they still remain *undeveloped*.

The *third* source of supply has always been claimed as an almost inexhaustible supply since 1895 (Exhibit "C-1" and "C-2"). It has always been conceded to be usable and safe if developed by modern filtration methods. It is now in use by the City of Lawrence, Massachusetts, and with filtration alone produces a supply which, according to the Board of Public Health of Massachusetts, compares not only favorably with present Metropolitan District supplies, but slightly better. (Joint Summary of Evidence, p. 203, 204).

The *fourth* supply was prepared by the designing engineer of the Metropolitan Water Supply Commission, and introduced in evidence in this case after consultation with the several expert engineers representing Massachusetts. It is known as the Kennison plan from its author. It is designed to utilize the Ipswich and Merrimack Rivers and to produce as much water as the combined Ware and Swift plan (Joint Summary of Evidence, pp. 245, 246.) It has the advantage of adding to the previously suggested treatment by filtration the additional safeguard of storage.

With all these sources suggested by Massachusetts' experts still undeveloped, the claim of Massachusetts as set forth in the Answer that it can not obtain a supply of water anywhere within the Commonwealth except from the Connecticut valley, fails; in fact, it is unequivocally disproved although the burden was upon Massachusetts to sustain that affirmative allegation.

As to some of these sources of supply, especially the last one, it is claimed that the rivers in question are now polluted, that there are necessary requirements for process water for manufacturers and needed water for power purposes involved. It might be a sufficient answer to these claims to remind Massachusetts of their first premise, that the highest use of water should be for domestic use, a principle to which we readily agree.

If some of the sources of supply are polluted, Massachusetts is responsible for the condition which exists, and which can exist only so long as Massachusetts permits it to do so.

It can control the purity of the waters within its borders, and if it declines to exercise its powers in this respect it cannot deprive Connecticut of the use of natural resources to take the place of what it is losing because of its own carelessness, negligence or selfishness.

> "It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature." (Missouri *v.* Kansas, 200 U. S., 521, 522.)

That present conditions can be remedied is demonstrated in the testimony of Dr. Goodnough, head of the Department of Public Health of Massachusetts, who testified (Joint Summary of Evidence, p. 223) that one of the inevitable results of a decree of this court refusing to Massachusetts the waters of the Ware and Swift Rivers and the necessary alternative of using the Merrimac River as a water supply would be the immediate construction of a sewer to remove the Massachusetts pollution from the Merrimac River or the construction of sewerage disposal plants to accomplish the same result.

Assuming, however, that Massachusetts and the Special Master are correct in saying that Eastern Massachusetts should not be compelled to utilize these available sources of supply, especially those in a present badly polluted state, and that the necessity or emergency should be now met by permitting the Ware and Swift waters to be taken, what is to be the nature of the taking? Is it to be of a temporary character to relieve the present necessity or emergency? Is it to be only until such time as the waters in Eastern Massachusetts can be cleaned up and made ready for use? Or is it a permanent taking, the forerunner of further invasions of the Connecticut watershed?

The claim of necessity and emergency urged as the basis for the exercise of equitable relief might suggest a temporary expedient until Massachusetts' house can be put in order but the finding of the Special Master is discouraging. He finds no disposition upon the part of Massachusetts to remedy present conditions and concludes that the future will be blacker than the present.

If such be the case, it is asking a good deal of the Court to relieve an emergency so that the supplicant may make permanent a condition which equity should insist be adequately cared for within a reasonable time as a condition precedent to the granting of the relief sought.

If Massachusetts is permitted to take the waters of the Ware and Swift Rivers, such taking should be accomplished with the least possible damage to Connecticut and its citizens —the ideal would be to so arrange the diversion that no damage would result.

If the "equitable use" of the stream means anything at all, it means so using the waters in the upper state that it will not interfere, or will interfere as little as possible, with the use in the lower state. The major uses of the waters of the Connecticut River in the State of Connecticut will occur primarily at times of low flow and at times of high flow.

Navigation—The War Department took as its critical point 2.1 feet on the Hartford Gauge. The uncontradicted evidence shows that due to the fact that the project has never been carried out, the critical depth is "from three to four feet", (Complainant's brief, page 84); that during this time, every drop of water that can be obtained is absolutely essential, while above that amount the value of additional water decreases as far as navigation is concerned, although it is more "economical" to navigate the river at flows higher than four feet.

Power—The record shows that water for power is desirable at all stages of the river up to the point where the flow of the stream would be equivalent to 50,000 horsepower and any diversion above that point would not adversely affect power development on the Connecticut River. (The record is silent as to either the gauge height or the flow of the river equivalent to

50,000 horsepower.) The record does show, however, that by proper regulation of the flow of water, namely, storing it during times of high flow and releasing additional quantities under proper regulation at *all* times when there is an extreme deficiency of power, that such reliability of increases in stream flow will decrease the steam power plants required and could be made to compensate in kind for the loss in power due to diversions by furnishing water at other times of the year when the power is more valuable.

Agriculture—The Record shows that the only use made of the water of the Connecticut River for agricultural purposes is that of the flood waters in inundating the land. This inundation occurs when the height of the Hartford gauge is 16 feet or over, and therefore there will be no damage to agriculture by any diversions except when the gauge at Hartford is 16 feet or above.

Pollution and Fish Life—In regard to pollution and fish life, both of these are affected by diversions at low flow and also at high flow. The low flow is needed for maintaining the oxygen conditions when the river is in such shape that danger to fish life or nuisance is likely to occur. Also, high flood flows are valuable in flushing out the river and pushing fresh water into the Sound.

Therefore, it would appear that if diversions were limited to the time when the Hartford gauge is between 4 feet and 16 feet, little or no damage will be done to navigation, agriculture, pollution and fish life. Furthermore, any damage which occurs to water power could be lessened or completely eliminated by proper regulation for the release of stored waters with regularity and assurance during times of extreme dry weather, so as to reduce the steam standby power required and increase the water power available at such times.

Such regulation will not affect the Massachusetts project. For example, Dr. Winsor testified that under the restrictions of the War Department, only 6 per cent of the total diversions would take place when the Hartford gauge was 3½ feet or less. This would equal about 14 million gallons a day. Furthermore, it was never contemplated by any engineers that the Ware and Swift would be so developed that it would affect the Hartford gauge during such times. The recommendations in House Document 1550 (Complainant's Exhibit "C-1," p. 174) referred to diversions of "flows in excess of 1.2 cubic feet per second per square mile of watershed." As shown in Complainant's Exhibit "C-25," this is between 4 and 5 feet on the Hartford gauge (4 feet being 1.09 and 5 feet being 1.48 cubic feet per second per square mile).

The record shows that there is an average of 13 days a year when the flood flow of the river will be in excess of 16 feet on the Hartford gauge. This is the period of time when agriculture receives all the benefit from flood waters. Massachusetts could have found and have offered to take the flow in excess of 1.2 cubic feet per second per square mile of watershed, which would be between four and five feet on the Hartford gauge, and refrained from taking any water when the flow was above 16 feet on the Hartford gauge on the average of 13 days per year, and might not have precipitated this controversy.

If this court should extend the doctrine of riparian use to include equitable division, it will undoubtedly take into consideration: (a) the supply of water in Eastern Massachusetts: (b) its condition and the length of time in which Massachusetts can, by the exercise of reasonable prudence and diligence, clean up these streams; (c) Apportionment to Massachusetts such volume of water of the Connecticut River as will take care of the needs of Massachusetts for the next thirty or forty years, during which time it can clean up the eastern resources;

(d) The possibility of effecting such an apportionment with little or no damage to Connecticut or its citizens. By doing this it gives Massachusetts what Connecticut has always been willing it should have, a supply of water which will make a water famine or shortage impossible during the period of time necessary for it to make available the resources at its door.

Any other course would be to stamp with the seal of approval of this Court Massachusetts' conduct in maintaining the streams in eastern Massachusetts as open sewers, and pointing to the Connecticut valley watershed as the only source of future additional supply, with the consequences that the damages will ever be increasing, the encroachments growing from time to time, and a definite check will be placed upon any effort to develop or improve navigation on an interstate stream.

The Court will not be unmindful of the tendency on the part of Congress to further develop navigation, i.e. to increase the navigability of streams. This can not be done if Massachusetts is permitted to permanently remove practically all of the water which is critically necessary to maintain navigation at its lowest point for many months in the year.

It is a significant and apparent fact that during these months the City of Hartford and other cities along the Connecticut River would be denied the right to take any water whatever from the river because if they did so they would lower the stage of the river below that which the War Department has indicated must be maintained in the interests of navigation.

The Court having taken jurisdiction of this cause, we feel that the decree of the Court should settle not only this controversy but be informative as to the rights of the states, and we respectfully ask that if the Court should be impressed with the needs of Massachusetts to immediately secure some addi-

tional water for the Metropolitan District it should limit the taking and clearly indicate that further taking will not be permitted. We feel that this Court can in its decree indicate a future course for Massachusetts to pursue in cleaning up the vast resources which are in the eastern watershed and that such a decree will not work injustice or hardship on either party but will result in lasting benefit and good to the situation as a whole.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS.

ANSWER OF DEFENDANT THE COMMONWEALTH OF MASSACHUSETTS.

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